

IP 01-1802-C H/K Abbott v Eviciti Corp
Judge David F. Hamilton

Signed on 06/29/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ABBOTT, JEROME T,)
ABBOTT, LARRY,)

Plaintiffs,)

vs.)

EVICITI CORP,)
HAVERSTICK CONSULTING INC,)
HIG CAPITAL LLC - DISMISSED)
3/31/03,)

Defendants.)

CAUSE NO. IP01-1802-C-H/K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JEROME T. ABBOTT and LARRY)	
ABBOTT,)	
)	
Plaintiffs,)	
)	
v.)	CAUSE NO. IP 01-1802-C H/K
)	
EVICITI CORP. and HAVERSTICK)	
CONSULTING INC.,)	
)	
Defendants.)	

ENTRY ON HAVERSTICK CONSULTING'S MOTION
FOR SUMMARY JUDGMENT

In an effort to keep a fledgling company with negative cash flow afloat, plaintiffs Jerome T. Abbott and Larry Abbott loaned money to defendant Eviciti Corporation in the summer of 2000. Eviciti was an information technology consulting company started in 1996 by Scott Abbott, Larry's son and Jerome's nephew. After receiving the loans from plaintiffs and others, Eviciti continued to lose money. Eviciti eventually entered into a "management agreement" with defendant Haverstick Consulting Inc. in December 2001 in an effort to salvage what could be salvaged and to avoid a forced liquidation.

The effort resulted in completion of pending Eviciti contracts by Haverstick and collection of Eviciti receivables, which were used to pay many Eviciti vendors

and creditors, including its senior secured creditor, Fifth Third Bank. The effort also resulted in Haverstick using and eventually absorbing Eviciti employees, business relationships built by Eviciti, and even, to some small degree, Eviciti's physical assets. Haverstick also reached agreement with the largest junior creditor to accept shares of Haverstick common stock in exchange for its Eviciti notes. The same arrangement was offered to plaintiffs as well. Plaintiffs elected not to exchange their notes for the offered Haverstick shares. They have chosen to litigate in an attempt to receive payment on the notes either from Eviciti or Haverstick. Since Eviciti is essentially without assets and is already the subject of a default entry, the clear target is Haverstick.

Plaintiffs' First Amended Complaint sets forth three different theories of recovery against Haverstick. First, plaintiffs allege that Haverstick is liable as successor in interest to Eviciti for breach of contract on the notes Eviciti issued to the plaintiffs. Plaintiffs also invoke second the doctrine of equitable subordination, and third fraudulent transfer, alleging that the management agreement effectively transferred the assets of Eviciti to Haverstick without fair compensation. According to plaintiffs, the management agreement allowed Haverstick to benefit inequitably from Eviciti's business relationships to the detriment of plaintiffs. Haverstick has moved for summary judgment on all counts. For the reasons explained below, the court grants the motion.

Summary Judgment Standard

Summary judgment should be granted if and only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine factual question exists, the court examines the pleadings and the proof as presented in depositions, answers to interrogatories, admissions, and affidavits made a part of the record. *First Bank & Trust v. Firststar Information Services, Corp.*, 276 F.3d 317 (7th Cir. 2001). The court also draws all reasonable inferences from undisputed facts in favor of the non-moving parties and views the disputed evidence in the light most favorable to the non-moving parties. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).¹ However, the non-moving parties may not rest upon mere allegations in the pleadings or speculative affidavits. They must go beyond the pleadings and support their contentions with admissible evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Only competing evidence regarding facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). If the non-moving parties would be unable to prove an element essential to their case, one on which they would bear the burden of proof at trial, summary judgment should be granted to the moving party. *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996).

¹While the court is required to view the evidence in the light most favorable to the non-moving parties, pursuant to Local Rule 56.1, to the extent the non-moving parties fail to controvert specifically the facts set forth in the moving party's "Statement of Material Facts Not in Dispute," as was the case in a number of instances here, the court may assume those facts to be true.

Undisputed Facts

In light of the summary judgment standard, the court treats the following facts as true for purposes of the motion for summary judgment. At the beginning, Eviciti was known as The Alliance Group or TAG. It grew and saw success on a relatively small and local level. Inspired by the technology boom of the 1990s Scott Abbott sought to expand Eviciti and its market quickly, and to take it public. In 1999 he agreed to issue preferred shares to HIG Capital, Inc. in exchange for an infusion of approximately \$7 million in venture capital. This move cost him much of his equity in the company, as well as control over the company's board of directors.

The company then continued to grow at a much more rapid pace. It acquired many talented employees, business partners, and influential clients. However, by summer 2000 the technology boom had slowed dramatically. The "grow at all costs" strategy was not panning out because the company was hemorrhaging cash. More cash was needed, and HIG was not willing to invest more without additional financial backers.

In July 2000 Eviciti borrowed approximately \$3.5 million from HIG and six other persons through the execution of two notes. Plaintiffs participated as lenders. Jerome T. Abbott, who was also an Eviciti shareholder, loaned \$250,000 under each note and Larry Abbott loaned \$87,500 under each note, for a total of

\$675,000. Plaintiffs were granted a broad security interest in all accounts, licenses, fixtures, equipment, general intangibles and the like, which was perfected on December 15, 2000. Interest payments on the notes were to begin in October 2000 with full payment due March 31, 2001.

Eviciti continued to have problems. It made no interest payments on the notes, and its pleas to plaintiffs for further cash to help make payroll were unsuccessful. By October 2000 the Eviciti board of directors, which included three HIG members as well as Scott Abbott and his two brothers, unanimously agreed that it would be in the company's best interest to seek a buyer. Eviciti lost more than \$6 million in 2000 and defaulted on the notes, never even making an interest payment. Trade vendors were not paid but instead were given unsecured promissory notes for the debt. By the fall of 2001 Eviciti was in default to its primary secured lender and on its equipment and office leases, and owed money to its business partner, IBM.

Eviciti's and HIG's considerable efforts to locate a buyer for the company proved unsuccessful until August 2001. Haverstick was in the market for a technology consulting firm and heard from an investment banker that HIG was trying to sell its investment in a consulting company. Several meetings were held and Haverstick expressed its interest in purchasing Eviciti. Haverstick and Eviciti entered into a letter of intent dated October 4, 2001 whereby, following due diligence investigation and Eviciti's conversion of preferred shares, options, and

debt to common shares, Haverstick was to obtain 100% of Eviciti shares in exchange for 25% of Haverstick's outstanding shares. After doing its due diligence investigation, Haverstick backed out of that arrangement. Its chief financial officer from the time testified: "the conclusion based on the total due diligence was that even if the company were to remove the shareholder debt and the preferred stock . . . , the company still had so much debt and so many obligations outstanding that it had a negative value at the time."

After additional conversations with HIG and Eviciti representatives, Haverstick agreed to enter into another letter of intent, this time offering only 4% of its common stock in exchange for all Eviciti stock, and requiring prior settlement of Eviciti's subordinated debt and shareholder debt. Eviciti had problems negotiating its trade debt, and plaintiffs refused to convert the notes they held into common shares of Eviciti, thus barring this proposal, as well. At all times, Haverstick's clear intent with respect to any transaction was to avoid taking on the tremendous debt incurred by Eviciti.

In an effort to rescue whatever good could be saved from Eviciti's rapidly sinking ship, in December 2001 both Eviciti and Haverstick agreed to a management arrangement. The agreement would not subject Haverstick to Eviciti's liabilities but would allow Eviciti to complete its contracts, collect its receivables and, along with the sale of its inventory and the bulk of its equipment, use the proceeds to pay down its debts. The management agreement was

negotiated between Eviciti, HIG, and Haverstick. Each party was represented by counsel. Eviciti's primary secured lender sent a representative to some of the meetings as well. At the same time, Haverstick negotiated a "loan purchase agreement" with HIG, who had loaned over \$2.2 million of the \$3.5 million back in July 2000. Under that agreement Haverstick set aside 4% of its common stock to be available *pro rata* to all who had loaned money to Eviciti under the July 2000 notes. HIG accepted its shares of Haverstick stock in exchange for its notes. Plaintiffs did not. The record is unclear as to whether any of the four other lenders participated in the loan purchase agreement.

As contemplated during the negotiation of the management agreement, Eviciti filed a voluntary petition for bankruptcy under Chapter 11 on January 9, 2002. It sought and received "first day" preliminary bankruptcy court approval to move forward with what in essence was a liquidation of Eviciti's assets by implementing the management agreement, collecting its receivables, and paying its trade vendors and primary secured creditor. Plaintiffs filed an objection to the request for approval of the management agreement and a hearing was held. The bankruptcy court never provided more than preliminary approval of the management agreement prior to the dismissal of the bankruptcy petition, a year after it was filed.

Many of Eviciti's employees were able to remain employed and continued to cultivate professional relationships, but they did so with Haverstick instead of

Eviciti. Eviciti was able to avoid being sued for failure to complete contracts and ended up collecting its receivables, minus the management charges from Haverstick. Fifth Third Bank as primary secured creditor was paid off. HIG received some value for the defaulted notes in the form of Haverstick stock and the potential for further value down the road. Trade creditors received payments on their accounts and promissory notes. And, for 4% of its common stock, Haverstick was able to acquire additional consulting expertise and a chance to win over Eviciti's customers and business partners. Additional facts are stated below as needed, keeping in mind the standard that applies to a motion for summary judgment.

Analysis

Plaintiffs' July 2000 investment in Eviciti was extremely risky. The company had a negative cash flow at the time. Scott Abbott had sold his and his family's ability to call the shots to HIG in exchange for a substantial amount of cash for the business. Plaintiffs agreed to be lenders under a supplemental loan program where the majority of the money being loaned was coming from another party who already had the advantage of being ahead in Eviciti's line of creditors. As Eviciti was running out of money, it entered into an arms'-length deal with Haverstick to salvage what could be salvaged under the management agreement. The fact that the deal was favorable to Haverstick was the result of Eviciti's weak position. The undisputed facts show there is no legal theory under which

plaintiffs can successfully claim that Haverstick is liable to re-pay their risky loans to Eviciti.

I. *Successor Liability for Breach of Contract*

Plaintiffs argue that the management agreement was a thinly disguised effort to allow Haverstick to acquire the assets of Eviciti, namely its client and business partner relationships and its employees, for less than fair value. Haverstick's first line of defense is to claim that the management agreement is no more than what its name implies, an agreement to take over various responsibilities of Eviciti for a fee and other consideration. Haverstick says no purchase or transfer of assets occurred. For purposes of summary judgment, the court assumes the deal allowed Haverstick to buy Eviciti's assets without accepting its liabilities. Such an arrangement is lawful and does not give rise to successor liability except under limited circumstances.

In Indiana the general rule is that corporate assets may be purchased without incurring the seller corporation's liabilities. The four recognized exceptions are: (1) an implied or express agreement to assume obligations; (2) a fraudulent sale of assets conducted for the purpose of escaping liabilities; (3) a purchase that amounts to a *de facto* consolidation or merger; or (4) an instance where the purchaser is a mere continuation of the seller. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1233 (Ind. 1994). Plaintiffs argue that exceptions

two, three and four may apply here. Claiming that Eviciti's most valuable assets were its "workforce in place" and its client relationships, plaintiffs maintain that the management agreement was a "sham" that allowed the seamless transfer of those assets at virtually no cost to Haverstick without corresponding liabilities. The undisputed facts show that none of the exceptions applies here.

A. *No Fraudulent Sale of Assets*

The undisputed facts show that the management agreement was not a deal with a favored insider. It was instead an arms' length deal to salvage what could be saved from a once-promising business that had run out of cash.

Throughout their brief, plaintiffs argue as though there is something wrong with Haverstick's intent to benefit its company through the acquisition of certain assets of Eviciti without taking on Eviciti's mountain of debt. There is no legal or ethical barrier to such an acquisition. Any sensible buyer would have sought to avoid taking on the massive liabilities accumulated by Eviciti. The fact that Haverstick sought advice of counsel to protect itself from millions in potential liabilities is neither surprising nor suspicious. In fact, in most respects the law supports the efforts that were made here; that is to say, it is better to save those who can be saved from a sinking ship than it is to let everyone go down in the name of fairness. Even here though, plaintiffs had the same opportunity to receive something in return for their notes as did all the other lenders under the

notes at issue. They could have taken Haverstick stock for their notes. To the extent that plaintiffs' junior security interest was compromised in some fashion not apparent from this record, they would have an action in that regard. That is not what they plead nor what they pursue here.²

The undisputed facts show that Eviciti was insolvent and was only days away from having to close its doors. The management agreement provided a means for making substantial payments to senior creditors. Junior creditors like plaintiffs could not reasonably expect anything from forced liquidation; the opportunity to trade their notes for a sliver of Haverstick stock was the best offer available to them. There was nothing fraudulent about the transaction.

B. *No De Facto Merger*

Plaintiffs argue that Haverstick's use of Eviciti office space and equipment, as well as its employment of Bryan Orr as Eviciti's officer in charge, with his salary and benefits paid by Haverstick and his non-compete agreement written to its benefit, show that Haverstick ignored corporate form and treated the two entities as merged into one. The undisputed facts refute the argument. Plaintiffs point to nothing that was done in contravention of the management agreement,

²The record lends some support to an argument that plaintiffs' security interest in Eviciti's equipment could be foreclosed to require Eviciti to repossess and sell off any computer software and equipment that Haverstick obtained from Eviciti. However, such a claim has not been pled, and the value of the equipment is under \$12,000, not enough to sustain diversity jurisdiction in this court or to support an economically viable lawsuit here.

which clearly contemplated that Haverstick, as an independent contractor, would use Eviciti offices and equipment to complete contracts and to collect receivables. While Bryan Orr and two other employees were retained by Haverstick as Eviciti employees to oversee the transition and winding down, the court sees no harm to Eviciti or the plaintiffs resulting from this temporary arrangement. The salaries and benefits of those whom Haverstick employed as Eviciti employees were charged back against Eviciti under the management agreement.

This is not a case where the upper level management at Eviciti simply slid over and began taking pay as Haverstick employees, as might occur in a *de facto* merger or consolidation. There is neither the continuity of ownership or management nor the assumption of day to day liabilities normally contemplated in connection with a *de facto* merger. See *Sorenson v. Allied Products Corp.*, 706 N.E.2d 1097, 1100 (Ind. App. 1999). There was no *de facto* merger, and corporate form was not abandoned such that successor liability should attach.

C. *No Continuation*

There was no material continuity of ownership between Eviciti and Haverstick. HIG managed to obtain a sliver of Haverstick stock in exchange for its junior debt with Eviciti, but this is not a situation where essentially the same owners simply chose to continue the same business under a new corporate identity to avoid prior obligations. See *Sorenson v. Allied Products Corp.*,

706 N.E.2d 1097, 1100 (Ind. App. 1990) (affirming summary judgment for buyer of assets where there were no common shareholders).

Plaintiffs rely on this court's decision denying summary judgment in *HAS, Inc. v. Bridgton, Inc.*, 1999 WL 1893209 (S.D. Ind. 1999), but their reliance is misplaced. In *HAS* the old and new companies had essentially the same ownership and senior management. The new company was formed to avoid a non-competition covenant that bound the old company. See *id.* at *14. There was no arms'-length transaction, but (at least on the facts assumed for purposes of summary judgment) only a transparent effort to evade the old company's obligations. In this case, by contrast, there was no continuity between old and new ownership or senior management, other than HIG's minor share of Haverstick. The management agreement obviously was not a deal to allow HIG to spirit assets away from other owners and creditors of Eviciti. The evidence could not support a finding that Eviciti had an illicit purpose in entering into the management agreement. It was concerned with allowing its employees to continue to be employed, allowing its trade vendors and other creditors to receive some value through collection of receivables, avoiding lawsuits for failure to complete contracts, and avoiding a forced liquidation.

II. *Fraudulent Conveyance*

Plaintiffs argue that pursuant to the Uniform Fraudulent Transfer Act (“UFTA”), codified in Indiana at Ind. Code § 32-18-2-1 *et seq.*, the management agreement amounted to a fraudulent transfer or obligation because Eviciti was insolvent and received less than reasonably equivalent value for its customer relationships and workforce in place. See Ind. Code § 32-28-2-5. Plaintiffs’ argument fails as a matter of law.

The UFTA does not apply to property subject to a valid lien, such as a perfected security interest. Ind. Code § 32-18-2-2. The notes taken by plaintiffs provide them with a security interest in all “general intangibles,” and they perfected that security interest. Accordingly the UFTA does not apply here.

To avoid this problem, plaintiffs cite the cases of *In re Valente*, 360 F.3d 256 (1st Cir. 2003), and *Jordan v. Turner*, 3 Blackf. 309 (Ind. 1833), to argue that the UFTA is not the exclusive remedy for a fraudulent transfer. Plaintiffs urge the court to apply common law fraudulent transfer principles. *Jordan*, one of the earliest Indiana Supreme Court decisions, stands for the proposition that a lien, in the form of a writing indicating that another had delivered certain chattel as security to be redeemed upon later payment, does not take priority over a later judgment lien where the evidence indicates that the personal property had never been turned over to the first lien holder. Rather, the court opined, retention of possession is evidence of an intention to deceive third parties. While there are certainly elements of fraudulent conveyance law in the *Jordan* decision, its holding

has no application to the circumstances at hand, and the decision predates the UFTA considerably.

In re Valente stands for the proposition that, at least in Rhode Island, the UFTA does not preempt the field of equitable recovery for fraudulent transfers. 360 F.3d at 261. The First Circuit reversed a district court affirmation of a bankruptcy court's denial of a turnover motion where the district court had lamented that a valid lien and the provisions of the UFTA prevented it from correcting a situation where one party played a blatant shell game with his real estate. *Id.* at 260. Unlike *Valente*, where the real estate was transferred to a relative for no consideration and where the court found the actions laden with fraudulent intent, the intangible assets supposedly transferred to Haverstick were only potential and conditional benefits obtained in exchange for the obligations to customers that Haverstick assumed in the management agreement. Regardless of whether the management agreement amounted to a transfer or not, there is simply no evidence of fraudulent intent here as there was in *Valente*. Plaintiffs are not entitled to relief under the UFTA.

III. *Equitable Subordination*

The doctrine of equitable subordination deals in the ordering of creditors based upon equitable considerations, especially where a creditor takes on multiple roles, such as shareholder, officer, and employee, as well as creditor. See *In re*

Lifschultz Fast Freight, 132 F.3d 339, 342, 344 (7th Cir. 1997). Indiana's enactment of the UFTA provides that the principles of equitable subordination supplement its provisions. See Ind. Code § 32-18-2-20. However, Indiana courts have yet to recognize a specific cause of action based upon the doctrine outside its use in the bankruptcy venue. See *PCL/Calumet v. Entercitement, LLC*, 760 N.E.2d 633, 640 (Ind. App. 2001).

Haverstick was not an insider with fiduciary duties to plaintiffs. It was not even a creditor of Eviciti before it entered into the management agreement. Accordingly, the doctrine of equitable subordination does not apply here. See *Lifschultz Fast Freight*, 132 F.3d at 344 (discussing elements of doctrine in bankruptcy proceedings). Even if it were deemed a creditor as a result of its purchase of HIG's notes, Haverstick's dealings with Eviciti were at arms' length, as shown by the undisputed facts. "Cases subordinating the claims of creditors that dealt at arm's length with the debtor are few and far between." *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1356 (7th Cir. 1990). The equitable subordination doctrine cannot help the plaintiffs here.

IV. *Eviciti's Value*

Plaintiffs contend that Eviciti had a net value of \$4.5 million when it filed for bankruptcy protection on January 9, 2002, a few weeks after the December 17, 2001 execution of the management agreement. Plaintiffs rely on an affidavit from

Thomas J. Sponsel, an experienced accountant and business consultant. The court has rejected plaintiffs' theories for holding Haverstick liable for Eviciti's debts without treating the actual net value of Eviciti as a material fact. Plaintiffs have not explained just where this evidence fits into their theories, but the court assumes that their claims might have more substance to them if a truly valuable company that could have paid off its notes was somehow hijacked away from them.

According to plaintiffs' expert, the intangible asset value of Eviciti's assembled workforce and customer base was almost \$8.5 million. Plaintiffs contend that Haverstick obtained these valuable assets for next to nothing, resulting in a deal so one sided as to be a sham. The expert's opinion does not raise a *genuine* issue of fact as to the actual value of Eviciti. The court cannot close its eyes to the rest and best of the evidence. Plaintiffs' expert offers a formula for assessing intangible value, but neither he nor plaintiffs provide a foundation for the reliability of his methodology. The key to the admissibility of any expert testimony is that, in addition to being relevant, the court finds it reliable. *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000).

The most accurate determination of the true value of anything in a free market system is established by the market place. This is not a case where experts must try to reconstruct the results of hypothetical negotiations between a willing buyer and a willing seller. There was a real transaction here. The

undisputed facts show that Eviciti and its assets were for sale in 2001. The market was not interested. The undisputed facts show that Eviciti worked very hard at finding potential buyers or investors in 2001. Despite these extensive and even desperate efforts, no one other than Haverstick showed any interest in purchasing Eviciti or its intangible assets and then, after due diligence, not for anywhere near the \$4.5 million net value plaintiffs now assign to Eviciti.

Eviciti and Haverstick went through considerable negotiations, with both sides represented by legal counsel. HIG and Eviciti's primary secured lender, Fifth Third Bank, attended as well. The management agreement was an arms'-length agreement. In a free market without involuntary servitude, the agreement could not guarantee that Eviciti clients or employees would remain with Haverstick. Was Haverstick working with fairly good odds that employees would want to keep the type of jobs they had accepted with Eviciti, especially those subject to written non-compete agreements? No doubt. Was it also a good bet that if those employees finished work for existing clients satisfactorily, those client relationships would roll over to Haverstick? That too was probably more likely to occur than not. But Haverstick had to assume contingencies and risks while fronting the costs of completing those jobs. The work might or might not have ended up being finished to the clients' satisfaction, and might or might not have been staffed with the same people who had worked for Eviciti. While 20/20 hindsight shows that Haverstick profited from the management agreement, that does not mean that plaintiffs, as Eviciti creditors, were cheated or hoodwinked.

Plaintiffs have no substantial evidence to support a claim that any better deal was available to Eviciti. Such evidence is the true test of whether the management agreement was a sham and whether Eviciti received less than fair value for its assets, assuming the management agreement could be deemed a sale of assets.

Conclusion

Plaintiffs are experienced businessmen. At the urging of close relatives deeply involved in running a struggling company, they loaned Eviciti money. They understood that it was a risky loan. They were junior secured lenders, and their loan money represented a small share of the junior loan. Their leverage was limited. When Eviciti was only days away from closing its doors, its management worked out the best deal it could, one that provided payment to more senior creditors, new jobs to most employees, and completed work to most customers. The deal was negotiated at arms' length, and Haverstick was not required to take on all of Eviciti's liabilities as a condition of the deal.

Plaintiffs might still have some limited ability to recover from the defaulted Eviciti pursuant to their lien and what appear to be some minimal remaining unliquidated assets. But plaintiffs have no case against Haverstick. Plaintiffs' claims against Haverstick for breach of contract, fraudulent conveyance, and equitable subordination fail as a matter of law. Summary judgment in favor of Haverstick Consulting Inc. is granted. Entry of final judgment shall await a

hearing on plaintiffs' claims against Eviciti, upon which plaintiffs prevail by default. Plaintiffs' counsel shall advise the court promptly how they wish to proceed against Eviciti.

So ordered.

Date: June 29, 2005

DAVID F. HAMILTON, JUDGE
United States District Court
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